IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3824 OF 2006

Smt. Kala Bhagirath Zaveri and Ors. ..Petitioners

Vs.

Shri Mithalal Ratanchand Jain and anr. ..Respondents

Ms. Kala Bhagirath Zaveri, party-in-person present.
Mr. R.D. Suryawanshi for respondent no.1.'
Mr. S.M. Oak for respondent no.2.

CORAM: B.H. MARLAPALLE, J.

Date of Reserve : July 25, 2006.

Date of Pronouncement: August 3, 2006.

P.C.:

1. Heard the petitioner no.1 party-in-person, Mr.Suryanwanshi the learned counsel for respondent no.1 and Mr. Oak the learned counsel for respondent no.2.

2. Rule. Respondents waive service.

3. The petition is taken up for final hearing forthwith.

4. This petition filed under Article 227 of the Constitution assails the Judgment and Order passed by the learned District Judge at Thane on 15/9/2005 in Misc. Civil Appeal No.26 of 2005, whereby the order passed by the learned Joint Civil Judge, Junior Division at Thane on 8/2/2005 allowing the application at Exh.5 came to be confirmed.

5. Regular Civil Suit No.748 of 2003 came to be filed by the respondent no.1 challenging the notice of demolition issued under Section 260 (1) and (2) of the Bombay Provincial Municipal Corporation Act, 1949 calling upon the plaintiff to demolish the suit structure standing on the land in old Survey No.39/A, new Survey No.11 Hissa No.2 (Part) of Bhyander, District Thane. The said notice was dated 21/10/2003. The application at Exh.5 was allowed by the trial court by order dated 12/1/2004 and the said order was challenged by the landlord in Misc. Civil Appeal No.15 of 2004 and by the defendant no.1-Municipal Corporation in Misc. Civil Appeal No.59 of 2004.

6. Misc. Civil Appeal No.15 of 2004 came to be partly allowed by the learned Joint District Judge at

Thane by his order dated 10/3/2004 and it read as under:-

> "The order of the lower court is set aside. The Respondent No.2 shall not demolish the disputed structures until reasoned order is passed by the Deputy Municipal Commissioner pursuant to the impugned notice, which is served on the Respondent No.1 and 15 days thereafter."

. Misc. Civil Appeal No.59 of 2004 was also disposed off in terms of the order passed in Appeal No.15 of 2004 on 26/7/2004. The respondent no.1 was given notice of hearing and such a notice was given to the petitioner as well. The Assistant Municipal Commissioner was pleased to hear the appeal of the respondent no.1 and by his order dated 9/11/2004 he confirmed the notice of demolition and held that the respondent no.1 had erected the suit structure without permission from the concerned departments and, therefore, the construction was declared as illegal. Being aggrieved by this order passed by the Assistant Municipal Commissioner of the respondent

no.2-Corporation, the respondent no.1 filed Regular Civil Suit No.653 of 2004 challenging the said order dated 9/11/2004 and further prayed for the permanent injunction restraining the Municipal Corporation or any of its officers/agents from acting upon the impugned order dated 9/11/2004.

7. The learned Joint Civil Judge, Junior Division, Thane was pleased to allow the application for temporary injunction filed at Exh.5 vide his judgment and order dated 8/2/2005. The trial court directed to preserve the suit property by maintaining status quo and by not giving effect to the suit notice until the disposal of the suit. This order was challenged in Misc. Civil Appeal No.26 of 2005 by the landlord and the appeal has been dismissed by the learned District Judge.

8. There was no dispute that the landlord had put the plaintiff in possession of the suit land. The suit land, admeasuring about an acre, was initially purchased by Bhagirath Dhirajlal @ Ashok Zaveri, the husband of petitioner no.1 and father of petitioner nos.2 and 3, as an agricultural land situated in

village Bhyander on or about 27/9/1965 and it was put in possession of respondent no.1/plaintiff in August 1969 on tenancy basis and on the rent of Rs.1000/- per month. The land owner migrated to the U.S.A. with his wife and two children in 1970. On 13/5/1988 the land owner died in U.S.A. In the meanwhile, the plaintiff put up four sheds on the suit property and these structures have been directed to be demolished by the respondent no.2-corporation. The suit is filed by the respondent no.1 challenging the action of the Municipal Corporation and in any case the demolition of the suit structures is not an order of eviction. Though the demolition has been directed at the instance of the land owners i.e. present petitioners, it cannot be, even prima facie, presumed that the land owners have sought to use the order of demolition for evicting the plaintiff from the suit land. The plaintiff relied upon the tenancy agreement dated 4/4/1975 and city survey plan showing the existence of structures prior to 1971, municipal tax receipt and copy of the notice issued by the Corporation on 1/10/2003. Though the learned Judge of the trial court held that there was a prima facie case in favour of the plaintiff, he did not record a prima facie

finding whether the declaration of the structures being illegal/unauthorised was contrary to the provisions of the Act or the said declaration was done without any authority under the said Act. The trial court was overwhelmed by the fact that the order was passed by the Assistant Commissioner and not by the Deputy Commissioner. As per the trial court the learned Joint District Judge had directed the Deputy Municipal Commissioner to hear the parties and pass a fresh order and the trial court noted that it was not the order passed by the Deputy Commissioner, but it was an order passed by the Assistant Commissioner and this view has been confirmed by the learned District Judge.

9. The order passed by the Assistant Commissioner by itself would not be a reason to hold, even prima facie, that the order challenged in the suit was illegal. It is possible that the Deputy Commissioner has delegated his powers to the Assistant Commissioner or the Assistant Commissioner was holding the charge of the Deputy Commissioner at the relevant time or the Commissioner of the Corporation had delegated the

powers to the Assistant Commissioner. This is an issue which will have to be gone into by leading evidence and just because the order was passed by the Assistant Commissioner instead of the Deputy Commissioner, that itself would not be a reason to hold a prima facie case in favour of the plaintiff. In fact, the plaintiff himself had appeared before the Assistant Commissioner and did not challenge his powers to hear the parties as directed by the learned Joint District Judge while disposing of the appeals.

10. On the contrary, it was necessary for the courts below to consider whether the suit itself could be entertained on the basis of the challenge or the averments set out in the plaint against the declaration made by the Assistant Commissioner vide his order dated 9/11/2004 or the notice of demolition issued under Section 260 (1) and (2) of the Act. Similar is the provision under Section 343 (1) of the Delhi Municipal Corporation Act, 1957 and in the case of Shiv Kumar Chadha vs. Municipal Corporation of Delhi and ors. **[(1993) 3 SCC 161]**, the scope of Section 343(1) of the said Act was considered

vis-a-vis maintainability of a suit challenging the proceedings initiated for demolition by the Commissioner. A three Judge Bench of the Apex Court stated thus:-

> "....According to us: (1) The court should not ordinarily entertain a suit in connection with the proceedings initiated for demolition, by the Commissioner, in terms of Section 343(1) of the Corporation Act. The court should direct the persons aggrieved to pursue the remedy before the appellate tribunal and then before the administrator in accordance with the provisions of the said Act. (2) The court should entertain a suit questioning the validity of an order passed under Section 343 of the Act, only if the court is of prima facie opinion that the order is nullity in the eyes of law because of any "jurisdictional error" in exercise of the power by the Commissioner or that the order is outside the Act."

. The second guide-line set out hereinabove by the Supreme Court in Shiv Kumar Chadha's case (Supra) is relevant for our consideration in as much as the suit could be entertained challenging the notice of demolition or the order dated 9/11/2004 declaring the said structures as illegal on a limited ground i.e. the said order is nullity in the eyes of law because of jurisdictional error in exercise of the powers by the Commissioner or that the order is outside the Act. Even on the issue of granting temporary injunctions, their Lordships in Shiv Kumar Chadha's case have set out guide-lines in para 30 to 32 and some of these guide-lines could be stated as under:-

(a) Grant of injunction is within the discretion of the court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit and on being satisfied that a strong prima

facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to the plaintiff.

(b) The court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court.

(c) Power to grant injunction is an extraordinary power vested in the court to be exercised taking into consideration the facts and circumstances of a particular case. The courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the

order so passed.

11. In the instant case, the learned District Judge while confirming the order passed by the trial court noted that if the injunction order was not passed, the suit itself would become infructuous as the demolition would proceed pursuant to the declaration which was a subject matter of challenge before the trial court. However, as held by the Supreme Court in Shiv Kumar Chadha's case (Supra) the suit against such order itself is maintainable on very limited grounds i.e. it is a nullity in the eyes of law on account of jurisdictional error or the power has been exercised outside the Act and, therefore, the challenge to the order dated 9/11/2004 has to be tested on these two grounds only.

12. In the order dated 9/11/2004 the Assistant Commissioner, after hearing the parties, has held that though the suit construction was put up on obtaining permission from the village panchayant on 20/6/1975, he noted further that there was nothing to show that

the suit land was converted into a non-agricultural land and the permission was granted by the village panchayat subject to the order to be passed by the revenue authorities. Similarly, there was no resolution passed by the village panchayat granting such a permission as required under Sections 52 and 53 of the Bombay Village Panchayat Act, 1958. The Assistant Commissioner also noted that the Superintendent Land Record, Thane by his order dated 26/4/2001 had held that the subject structure was put up without obtaining N.A. permission under the Maharashtra Land Revenue Code, 1966. As on 20/6/1975 the subject land was an agricultural land and it could not have been put to use for industrial or any other non-agricultural purposes. This issue went to the root of the matter in deciding the legality of the said structures and, therefore, the declaration made by the Assistant Commissioner vide his order dated 9/11/2004 could not be, prima facie, said to be illegal or without authority in law.

13. It will be, therefore, necessary for the trial court to consider the scope of the suit in view of the

law laid down by the Supreme Court in Shiv Kumar Chadha's case (Supra). In the plaint itself the plaintiff has stated that he has put up four structures i.e. Building No.A admeasuring 150.42 sq.mtrs., Building No.B admeasuring 487.50 sq.mtrs., Building No.C admeasuring 110.86 sq.mtrs. and Building No.D admeasuring 400.52 sq.mtrs. with cement sheets roof on Building Nos.A,B, and D, whereas Building No.C has RCC structure and he claims that he is carrying on the business of L.D. reprocessing in the said structures in the name and style of M/s. B.J. Plastics. Looking at these averments it is clear that if the demolition is proceeded acting upon the declaration made by the Assistant Commissioner, it would cause irreparable loss to the plaintiff and, therefore, it would be necessary to maintain the status quo in respect of the said structures.

14. Hence, the petition is disposed off by directing the parties to maintain status quo in respect of the suit structures and the trial court shall examine the scope of the suit on the basis of the law laid down in Shiv Kumar Chadha's case (Supra).

The trial of the suit is hereby expedited and the application at Exh.5 is disposed off in terms of the status quo order.

15. Rule made absolute accordingly with no order as to costs. Writ to go forthwith.

(B.H. Marlapalle,J.)